UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

INTEGRATED CIRCUIT SYSTEMS, INC., Plaintiff(s), v. REALTEK SEMICONDUCTOR CO., LTD., Defendant(s).	No. C00-4035 MMC (BZ) **ORDER IMPOSING SANCTIONS**

Stripped of the rhetoric that the parties to this patent litigation have hurled at each other, more by plaintiff than defendant, it appears that in response to a 30(b)(6) deposition notice filed by plaintiff, defendant designated several witnesses located in Taiwan. On November 14, 2001, the parties reached an agreement whereby the witnesses in Taiwan would be deposed over the telephone by counsel for plaintiff located in the bay area. The parties also agreed that the court reporter would be located in the bay area and the oath would be administered by an authorized person in Taiwan. (Nguyen Decl., Ex. 15 at 9.) The deposition was to

begin December 11, 2001. (Nguyen Decl., Ex. 19 at 2.) The entity plaintiff's counsel selected to administer the oaths, The American Institute in Taiwan ("AIT"), is located in Taipei, Taiwan. Subsequently, plaintiff was told that AIT would not travel to Hsinchu City to administer the oaths and notified defendant's counsel during the first week of December. (Nguyen Decl., Ex. 16; Ex. 17; Ex. 19.) Thereafter, a dispute arose regarding the administration of the oaths.

On December 20, 2001, in accordance with the previously entered Initial Discovery Order, counsel for plaintiff sent a letter requesting a phone conference to resolve the discovery dispute. (Nguyen Decl., Ex. 29 at 2.) On December 28, 2001, I conducted a telephone conference which lasted 40 minutes. During the conference, much of the discussion consisted of one party leveling personal accusations against the other. A recurrent theme was plaintiff's insistence that defendant had refused to meet and confer regarding the outstanding dispute and defendant's insistence that it had met and conferred as required by my Initial Discovery Order. I directed the parties to focus on the discovery disputes, issued an order resolving them, and then gave each party leave to file a motion for sanctions if it deemed them appropriate.

Plaintiff moved for sanctions, arguing that defendant's counsel failed to meet and confer in good faith, in violation of Fed. R. Civ. P. 37, Local Rule 37-1, and the court's Initial Discovery Order, and acted recklessly or in bad faith in violation of 28 U.S.C. § 1927. Defendant filed a cross-

motion pursuant to 28 U.S.C. § 1927, alleging plaintiff's counsel violated the Initial Discovery Order and acted recklessly or in bad faith. A hearing was held on March 6, 2002.

Reducing the six inches of papers filed by both sides to their essence, each side seeks sanctions for the other side's conduct during discovery, especially the handling of the dispute over the administration of the oath. Defendant also complains that plaintiff has made a number of unsubstantiated statements and representations to the court and to defendant, and that plaintiff has violated this court's order regulating the presentation of discovery motions.

The circumstances governing the parties' inability for several weeks to agree on how the oath should be administered were reviewed in excruciating detail during the two and one half hour hearing. Suffice it to say that counsels' conduct would provide a model for a legal education program on how not to civilly and expeditiously resolve a simple logistical issue. However, ineptness does not necessarily warrant sanctions, and certainly not under 28 U.S.C. § 1927, which requires a finding that a party acted recklessly or in bad faith. See Pac. Harbor Capital, Inc. v. Carnival Airlines, Inc., 210 F.3d 1112, 1118 (9th Cir. 2000). I therefore deny each sides motion with respect to this issue. I hope that both sides would recognize their inartful handling of this situation, if they have not already done so, when billing their clients.

For the future, both sides are reminded that the Federal

Rules of Civil Procedure are designed to "secure the just, speedy, and inexpensive determination of every action," Fed. R. Civ. P. 1, and are meant to "encourage extrajudicial discovery with a minimum of court intervention." Fed. R. Civ. P. 26-37 advisory committee's explanatory statement.

Pursuant to my Initial Discovery Order, if the parties cannot resolve their dispute, they must participate in a telephone conference before filing any motions. Plaintiff has twice violated the order; once by raising matters during the December 28 hearing that were not in its letter requesting a conference and once by filing a motion to compel document production without first requesting an informal conference. Having heard the explanations proffered during the hearing, I will not award sanctions under Rule 16(f). However, plaintiff is admonished to faithfully adhere to court orders in the future.

I do find a number of plaintiff's counsel's representations to the court to be lacking in evidentiary support and therefore sanctionable pursuant to Fed. R. Civ. P. 11, which provides in relevant part:

> (b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . .
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . .
> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision(b) has been violated, the court may. . . impose an appropriate sanction upon the attorneys,

law firms, or parties that have violated subdivision(b) or are responsible for the violation. Rule 11 empowers a court to impose sanctions "on its own initiative." Fed. R. Civ. P. 11(c)(1)(B); Chambers v. NASCO, Inc., 501 U.S. 32, 43 n.8 (1991). When a court chooses to impose Rule 11 sanctions *sua sponte*, notice and an opportunity to be heard must be given to the attorneys subject to the sanctions. See Navellier v. Sletten, 262 F.3d 923, 943 (9th Cir. 2001); Tom Growney Equip., Inc. v. Shelley Irrigations Dev., Inc., 834 F.2d 833, 835-36 (9th Cir. 1987). While neither party initially moved for sanctions pursuant to Rule 11, I issued an order on February 28, 2002 notifying the parties that I would also consider sanctions under Rule 11 and Rule 16 and gave them leave to file supplemental briefs. Both parties filed supplemental briefs. At the hearing on March 6, 2002, I reminded the parties that I would consider sanctions under Rule 11, and Rule 11 sanctions were discussed. See Hudson v. Moore Bus. Forms, Inc., 898 F.2d 684, 686 (9th Cir. 1990)(due process satisfied when "[t]he district court held a full sanctions hearing and was intimately familiar with the sanctioned conduct and the lawyers involved."). Here, the parties were given an opportunity to fully brief and provide evidence on their cross motions for sanctions, and were provided with a hearing.

A finding of subjective bad faith is not required under Rule 11; rather, Rule 11 is governed by an objective standard of reasonableness. See Smith v. Ricks, 31 F.3d 1478, 1488 (9th Cir. 1994)(quoting Zuniga v. United Can Co., 812 F.2d 443, 452 (9th Cir. 1987))("Counsel can no longer avoid the

sting of Rule 11 sanctions by operating under the guise of a pure heart and empty head."). See also Conn v. CSO Borjorquez, 967 F.2d 1418, 1420 (9th Cir. 1992). When considering whether Rule 11 sanctions should be imposed, a court should consider whether a position taken was "frivolous," "legally unreasonable," or "without factual foundation, even if not filed in subjective bad faith." Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 (9th Cir. 1986), overruled on other grounds, Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990). See also Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362-65 (9th Cir. 1990)(en banc). Rule 11 is "intended to be applied by district courts vigorously to curb widely acknowledged abuse from the filing of frivolous pleadings and other papers." Zaldivar, 780 F.2d at 829. In Zaldivar, the Ninth Circuit adopted the amended Rule 11 standard for testing violations worthy of sanctions. Under the amended Rule 11, the standard is objective: the attorney's knowledge has to be "reasonable under the circumstances." Id. Therefore, "[t]he issue in determining whether to impose sanctions under Rule 11 is whether a reasonable attorney, having conducted an objectively reasonable inquiry into the facts and law, would have concluded that the offending paper was well-founded." Truesdell v. Southern Cal. Permanente Med. Group, 151 F. Supp. 2d 1174, 1184-1185 (C.D. Cal. 2001)(quoting Schutts v. Bently Nev. Corp., 966 F. Supp. 1549, 1562 (D. Nev. 1997)).

Plaintiff charges that defendant's counsel "flatly refused repeated requests to meet and confer to resolve a

dispute regarding the administration of oaths," and has made "groundless refusals to meet and confer . . . ." (Pl.'s Mot. for Sanctions at 3:16-17; 6:9-12.) The record does not support these charges. The record reflects that when this first became an issue, defendant's counsel, on December 7, 2001, wrote plaintiff's counsel setting forth defendant's position and concluding "please do not hesitate to call if you wish to discuss these matters further." (Nguyen Decl., Ex. 17 at 2.) Plaintiff responded by letter of even date setting forth its position and complaining that no one from the defendant's office was "able to meet and confer to resolve this anytime this week, yet did not advise when anyone would be available." (Nguyen Decl., Ex. 19 at 2.) By letter dated December 10, 2001, in which document issues were discussed, counsel for plaintiff again requested to meet and confer on the oath administration issue. (Nguyen Decl., Ex. 20 at 1.) Defense counsel responded in a letter dated December 11, 2001, agreeing to meet on the document issues and declining "to meet and confer a second time on the administration of the oath" issue. (Nguyen Decl., Ex. 22 at 1.) Later that day, judging from the fax record, defense counsel sent another letter to counsel for plaintiff agreeing to meet and confer on Wednesday, December 19, 2001 at 1:30 p.m. (Nguyen Decl., Ex. 23.) Counsel for plaintiff insists that this letter cannot be construed as an offer to meet and confer on the oath administration issue in view of counsel's earlier December 11th letter. (3/6/02 Hr'g Tr. at 38:4-13.) The difficulty with this position is that since defendant's earlier December

11th letter had already offered to meet and confer on the document production issue on December 19th, plaintiff's interpretation of the second December 11th letter would make it entirely redundant and meaningless. Finally, the transcript of the December 19th meeting submitted by defendant reflects that the oath administration issue was discussed, albeit not constructively, during the December 19th meeting. (Finley Decl., Ex. C at 22.) I verified this by listening to the audio tape during the March 6, 2002 hearing. (3/6/02 Hr'g Tr. at 38:16-25; 39:1-25; 40:1-5.) Tellingly, the transcript of the December 19 meeting submitted by plaintiff omits this discussion. Given all this background, on December 20, 2001, one day after a meet and confer session was held in which the oath administration issue was discussed, plaintiff's counsel should not have stated in a letter to the court that "Realtek . . . refuses to meet and confer regarding this issue." (Nguyen Decl., Ex. 29 at 2.)

Defendant has complained about numerous other representations, such as plaintiff's statement that defendant's counsel "advised that he may be unavailable for all of January," and "might not be able to get this deposition in before February," when the record reflects that defense counsel had offered to have the deposition taken in mid-January; and the assertion to the court that plaintiff's counsel had not asked a witness for his home address when the record reflects that she had. These and other statements were explored in detail during the hearing and little would be gained by revisiting them here. Suffice it to say that the

record reflects a pattern by counsel for plaintiff of making sweeping statements which are either wholly or partly unsupported by the record. These statements especially are made in an aggressive and often accusatory fashion which not only does not assist in the resolution of the underlying problem but instead inflames it.

Rule 11 expressly authorizes the imposition of monetary and/or nonmonetary sanctions. See Fed. R. Civ. P. 11(c)(2); Weissman v. Quail Lodge, Inc., 179 F.3d 1194, 1198 (9th Cir. 1999). Sua sponte sanctions are limited to fines payable to the court or "directives of a nonmonetary nature." Fed. R. Civ. P. 11(c)(2). "It is critical . . . that the sanctioning court embrace the overriding purpose of deterrence and mold its sanctions in each case so as to best implement that policy." In re Yagman, 796 F.2d 1165, 1184 (9th Cir. 1986). Here, I find it proper to sanction plaintiff's counsel in the amount of $1000.00, payable to the Clerk of Court within 15 days of the date of this order.

For the foregoing reasons, and the reasons expressed during the hearing, **IT IS HEREBY ORDERED** that each side's motion for sanctions is **DENIED. IT IS FURTHER ORDERED** that counsel for plaintiff pay $1000.00 in sanctions to the Clerk of Court within fifteen (15) days.

Dated: April 5, 2002

Bernard Zimmerman
United States Magistrate Judge

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